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Supreme Court, U.S.
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No. 96-1424

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

MARISOL A., by her next friend
Rev. Dr. James Alexander Forbes, Jr., *et al.*,

Petitioners,

- v. -

RUDOLPH W. GIULIANI, as Mayor of the
City of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether the District Court abused its discretion in recertifying the controlling question of law pursuant to 28 U.S.C. § 1292(b), which it had certified for interlocutory appeal in a prior order, to enable defendants to file a timely petition for leave to appeal in the Court of Appeals.

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STATEMENT OF THE CASE

A. District Court Proceedings

Plaintiffs, eleven minor children, are residents of New York City who, through their "next friends," have sued, inter alia, the Mayor of the City of New York and the Commissioner of the City's Administration for Children's Services (ACS), successor to the Child Welfare Administration (CWA)[1] ("City defendants"), as well as the Governor of the State of New York and the Commissioner of the State's Department of Social Services (SDSS) ("State defendants"), claiming that they have been deprived of vested rights which they enjoy in the operation of New York City's child welfare system. They allege multiple deprivations of their civil rights, purportedly due to the systemic failure of the entire New York City child welfare system. The complaint, inter alia, purports to identify seven discrete and widely disparate questions of fact at issue in this lawsuit (which plaintiffs characterize as "common," though in actuality they touch upon virtually every facet of ACS's operations), three "common" questions of law in the form of reciting the multiple statutory bases on which this lawsuit is predicated, and, in conclusory fashion, asserts that "[t]he legal violations alleged by the named plaintiffs are typical of those raised by the claims of each and every member of the putative class. The harms suffered by the named

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[1] In or about February, 1996, the functions of the former Child Welfare Administration, a part of the Human Resources Administration, were reconstituted into a new agency called the Administration for Children's Services, and a new commissioner was appointed. In the interest of consistency, this brief will refer to ACS throughout.

plaintiffs are typical of the harms suffered by all children similarly situated" (A26-28).[2]

For their relief, plaintiffs seek, inter alia, "declaratory and injunctive relief necessary and appropriate to remedy the defendants' violations of the plaintiffs' rights," and for the Court to "[a]ppoint a receiver with full authority to oversee and direct the implementation of all of the injunctive relief granted by the court, to restructure the New York City child welfare system, and to take all steps necessary to ensure that the child welfare system operates in full compliance with all applicable law" (A126-127).

By notice of motion dated December 14, 1995, plaintiffs moved for an order for class certification upon the basis of the complaint (A129). Both the State and City defendants opposed the motion.

By opinion dated June 18, 1996 (A559-624), the District Court (Ward, J.), inter alia, granted plaintiffs' motion for class certification and adopted, without further refinement, the exact class definition set forth by plaintiffs in both their complaint and their motion papers. 929 F. Supp. 662 (S.D.N.Y. 1996). By order dated July 3, 1996, Judge Ward (Ward, J.) entered an order effecting his opinion granting class certification, certifying the class as follows (App. 36a):[3]

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[2] Numbers in parentheses preceded by the letter "A" refer to pages in the Joint Appendix filed in the United States Court of Appeals for the Second Circuit, on the pending interlocutory appeal from the District Court's order granting class certification.

[3] Consistent with plaintiffs' references, numbers in parentheses (continued...)

> All children who are or will be in the custody of the New York City Administration for Children's Services ("ACS"), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS.

By memorandum and order dated July 26, 1996, Judge Ward granted the City defendants' request to certify that portion of the July 3, 1996 order relating to class certification for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (App. 32a-33a). The District Court opined that it was constrained to grant the City defendants' motion for § 1292(b) certification, since the matter "involves a controlling question of law as to which there is substantial ground for difference of opinion and because an immediate appeal may materially advance the ultimate termination of the litigation" (App. 32a-33a).

Because the State defendants did not indicate at that time that they wished to appeal any part of the July 3, 1996 order, the July 26, 1996 order applied only to the City defendants. By a stipulation that was "so ordered" by the District Court on August 7, 1996 (the "stipulation"), the parties consented to permit the State defendants to join in the City defendants' application for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (App. 30a-31a). The parties stipulated that the State defendants' participation in the July 26, 1996 order was nunc pro tunc, and that the stipulation

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3 (...continued)
preceded by "App." refer to the Appendix to the Petition for Writ of Certiorari filed by plaintiffs.

did not extend any deadline established by that order (App. 30a).[4]

At a status conference before the District Court on August 8, 1996, the trial attorney for the City defendants made an oral application to the Court that it recertify, for the interlocutory appeal, the question of whether class certification was appropriate (App. 23a-24a). Plaintiffs initially objected to the proposed recertification of the controlling question because of fears that it would delay discovery in the case (App. 25a). However, they later withdrew the objection because the District Court required that discovery proceed regardless of recertification, and, in accordance with plaintiffs' own request, that defendants serve their motions for leave to appeal to the Court of Appeals within less than the full ten days to which they would otherwise have been entitled. Confident that the case would continue to proceed, plaintiffs acquiesced in the defendants' request that the Court vacate its July 26 order and issue another order, stating (App. 27a):

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[4] By the time the stipulation permitting the State defendants to join in the appeal was "so ordered" by the District Court, the statutory ten-day period under Fed. R. App. P. 5(a) had passed. As such, the State defendants never had a chance to timely seek leave to appeal from the Second Circuit, as the order was deemed to apply to them nunc pro tunc. Since it was plainly the intention of all parties and the District Court that the State defendants have a meaningful opportunity to interpose an interlocutory appeal herein, this could only be effectuated by the issuance of a second certification order, after which leave to appeal could be timely sought. Moreover, since a favorable result of the State defendants' appeal from the order granting class certification would necessarily inure to the benefit of the City defendants, precluding the City defendants from participating in the interlocutory appeal would have been pointless.

> MS. LOWRY: Your Honor, obviously our concern is that discovery proceed and it is going to proceed. The only thing that I would ask though, because it is still hanging over our heads, is that the City be instructed not to take the full ten days [to seek leave from the Second Circuit] and that there be a commitment that instead of having this run again from now and an additional ten days, that they be required to submit their papers, even though they technically have the ten days, that they submit it in a shorter time.
>
> * * *
>
> I would like to make it specific. I would like to have some agreement now.

Plaintiffs' counsel also responded, "Fine," when the District Court agreed to require the State and City defendants to make their applications for leave to appeal within three business days (App. 28a). As such, plaintiffs consented to the City defendants' application for recertification, and never took exception to the ruling of the District Court granting recertification.

By memorandum and order dated August 9, 1996, the District Court issued another order pursuant to 28 U.S.C. § 1292(b), certifying the question, for interlocutory review, of whether class certification was proper (App. 19a-20a). In the August 9 order, the District Court stated that it would again exercise its discretion to certify the matter for appellate consideration, and included the requirement that defendants

serve and file their motions for leave to appeal to the Second Circuit within three business days.

B. Court of Appeals Proceedings And Decision

On August 14, 1996, three business days after the August 9 order, both the State and City defendants filed their petitions for leave to appeal to the Second Circuit, which petitions that Court granted by orders dated September 3, 1996 (App. 16a-18a). When defendants served and filed their motions in accordance with the District Court's order, plaintiffs never objected on the grounds that the motions were untimely under Fed. R. App. P. 5(a), or that the District Court had abused its discretion by recertifying the controlling question of law it had previously certified in a prior order. The entire sequence of events, moreover, was expressly recited in the District Court's August 9 order recertifying the controlling question (App. 19a-20a).

The State and City defendants served and filed their respective appellants' briefs in the Second Circuit on the merits of the class certification issue, on or about November 1, 1996. Plaintiffs moved to dismiss defendants' appeals on November 19, 1996 (App. 13a-15a). Plaintiffs thus failed to object to the recertification until about one week before their appellees' brief was due in the Second Circuit. Moreover, plaintiffs failed to allege or demonstrate any prejudice occasioned by the recertification, nor could they, inasmuch as defendants proceeded expeditiously in the District Court, and filed their motions in the Second Circuit in accordance with the time frames imposed by the District Court at plaintiffs' own request.

By order dated December 10, 1996, the United States Court of Appeals denied plaintiffs' motion to dismiss the

appeals (App. 15a). On January 8, 1997, the Court issued an opinion explaining its ruling (App. 1a-12a). The Court held that a district court has the power to recertify under § 1292(b) the order being appealed, to enable the party seeking review of such order to timely file a petition for leave to appeal to the Court of Appeals (App. 3a).

In concluding that the prior panel did have jurisdiction to consider whether to exercise its discretion to grant defendants leave to appeal, the Court of Appeals adopted the Ninth Circuit's approach in In re Benny, 812 F.2d 1133, 1137 (9th Cir. 1987), which permits a court of appeals to exercise jurisdiction over a petition to appeal from a recertified interlocutory order if "jurisdiction over the appeal would serve judicial efficiency" and thus "advances the purposes of section 1292(b)" (App. 9a). Under that approach, a circuit court has discretion to accept such an appeal after considering several factors, including the length of the delay, the reasons for failing to timely file a petition in the circuit court, and any prejudice resulting to the opposing party from the delay (App. 9a-10a). The Court of Appeals in this case emphasized that the focus of the inquiry should be on ensuring that the goal of § 1292(b) will still be satisfied by permitting an interlocutory appeal (App. 10a). The Court flatly rejected plaintiffs' contention that an appellant's negligence in failing to timely petition for interlocutory appeal strips the district court of discretion to recertify an interlocutory order, and weighed such fault as but one factor in determining whether a district court's recertification furthers the goals of § 1292(b) (App. 10a-11a).

In finding that such goals were served in this case, the Second Circuit balanced the other factors militating in favor of allowing the interlocutory appeal, including the District Court's findings in its recertification order; defendants' motion for

recertification in the District Court just three days after the original ten-day period lapsed, and their petition to the Second Circuit for leave to appeal less than one week later; and the lack of prejudice to plaintiffs resulting from the recertification (App. 11a-12a). After evaluating all circumstances surrounding the recertification request, insofar as they relate to the ultimate efficiency goals of § 1292(b), the Second Circuit denied plaintiffs' motion to dismiss defendants' interlocutory appeals (App. 12a).

REASONS FOR DENYING THE WRIT

The writ should be denied because the Court of Appeals properly exercised its discretion in granting defendants leave to appeal from the class certification order pursuant to 28 U.S.C. § 1292(b). Contrary to plaintiffs' contentions, there is no split among the circuit courts of appeals on this issue; nor does the decision below contravene any federal rules, or conflict with any decisions of this Court. To the contrary, the Second Circuit's ruling is fully consistent with this Court's decision in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam), and with all applicable statutes and rules. Particularly, as the Court of Appeals concluded, certification and acceptance of the appeal here furthers the purpose and goals of 28 U.S.C. § 1292(b), which vests broad discretion in the district courts and the courts of appeals to either effectuate or deny immediate interlocutory review of certain issues, depending upon whether "a controlling question of law" is involved "as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The exercise of discretion by those courts does not raise a substantial legal question that should be reviewed by this Court.

Defendants in the case at bar timely petitioned the Court of Appeals following the District Court's recertification for interlocutory appeal of its order granting class certification, and the District Court granted recertification in accordance with the mandates and purpose of § 1292(b) (App. 20a). Neither 28 U.S.C. § 1292(b) nor Fed. R. App. P. 5(a) sets forth any time limit for a district court to certify an order for immediate interlocutory appeal, nor is there any provision which restricts or prohibits a district court from recertifying an order which had previously been certified for interlocutory appeal. There is no language in 28 U.S.C. § 1292(b) that restricts a district court's power to recertify a question for interlocutory appeal, nor does the statute set any time limitations therefor. In fact, Fed. R. App. P. 5(a) expressly contemplates that a district court "order may be amended to include the prescribed statement [pursuant to § 1292(b)] at any time, and permission to appeal may be sought within 10 days after entry of the order as amended" (App. 38a).

The only time limit imposed by these provisions is the requirement that a petition for leave to appeal be filed in the court of appeals within ten days from the entry of the district court's order certifying the issue for appeal. That time limit is concededly jurisdictional, in that absent a timely petition in the court of appeals, that court lacks jurisdiction of the proposed interlocutory appeal. See Myles v. Laffitte, 881 F.2d 125, 126-27 (4th Cir. 1989). The court cannot enlarge the ten-day time limit for filing the petition for leave to appeal following district court certification. Id. at 126; Fed. R. App. P. 26(b). No similar time restraint or jurisdictional limitation is imposed on the district court in entering its order certifying an issue for interlocutory appeal, which order can be entered at any time prior to entry of final judgment, or an amendment to any order can be made at any time certifying an issue for

interlocutory appeal pursuant to § 1292(b) and Fed. R. App. P. 5(a). Likewise, there is no bar, jurisdictional or otherwise, preventing the district court from recertifying an issue for interlocutory appeal, provided the requirements of § 1292(b) are satisfied. In fact, by analogy, the District Court is expressly authorized under Fed. R. App. P. 4(a)(5) to "extend the time for filing a notice of appeal" upon timely motion demonstrating "excusable neglect or good cause." Thus, contrary to plaintiffs' assertion that such time can be extended only for "excusable neglect" (Petition at 11 n.11 and 15 n.19), the rule specifically authorizes the district court to grant an extension of time entirely upon a timely showing of "good cause." Fed. R. App. P. 4(a)(5).

The District Court in this case, therefore, had the discretion to recertify the class certification issue for interlocutory appeal, and the Court of Appeals had the discretion to accept the appeal, upon the timely filing of a petition for leave to appeal following the District Court's recertification, which discretion the Courts properly exercised in this case. Both acts were accordingly within the sound discretion of the respective Courts, and did not contravene any statute, rule, or decision of this Court. Plaintiffs have failed to demonstrate any "compelling reasons," or the implication of any "important federal question," or a departure from accepted and usual judicial practice, or "the misapplication of a properly stated rule of law" (see Supreme Court Rule 10), to warrant this Court's grant of certiorari in this matter, which involves the mere exercise of the lower courts' discretion.

Contrary to plaintiffs' assertion that defendants' failure to timely petition the Court of Appeals after the District Court's initial § 1292(b) certification order constituted a noncurable "jurisdictional defect" (Petition at 16), the question

at issue is not one of jurisdiction, but of abuse of discretion. The only question properly raised by plaintiffs' Petition, therefore, is whether the District Court abused its discretion in recertifying the controlling question of law which it had certified in a prior order. The answer is that it did not, since the District Court has the power to reconsider or reissue its interlocutory rulings at any time, even to amend orders for purposes of § 1292(b); defendants proceeded expeditiously after recognizing a ministerial error in their calculation of the initial ten-day period; plaintiffs consented to the recertification; and both the District Court and the Court of Appeals concluded, in the proper exercise of their discretion, and in full compliance with § 1292(b) and Fed. R. App. P. 5(a), that the underlying controlling question of law should be resolved now.

Moreover, while there can be no waiver of an objection to jurisdiction, an objection based on abuse of discretion can be waived, and in this case was in fact waived by plaintiffs. Plaintiffs abandoned their objection to recertification, thereby consenting to and acquiescing in the recertification by the District Court, provided that defendants filed their petition in the Court of Appeals within three business days following the recertification order, rather than within the full ten days allowed by the statute (App. 27a-28a). Defendants' motions were timely filed within three business days from the District Court's recertification order dated August 9, 1996, and the Court of Appeals granted defendants' motions for leave to appeal from the interlocutory order granting class certification (App. 16a-18a). As defendants' motions for leave to appeal were timely filed in accordance with the District Court's April 9 order, and the Court of Appeals granted leave to appeal (App. 16a-18a), the Court of Appeals has jurisdiction to decide the interlocutory appeal, and plaintiffs waived their objection based on the City defendants' "neglect of counsel" in

failing to file a timely petition after the initial certification order (Petition at 10).

The issue of whether the Court of Appeals had jurisdiction to accept an appeal following a timely petition for leave to appeal after a recertification order was entered by the District Court has been implicitly resolved by this Court in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam). There, the Court was faced with a situation where no petition seeking leave to appeal to the Court of Appeals was ever filed within the ten-day period required by 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a). Nine months later (as opposed to the de minimis three days which elapsed before defendants sought recertification in the case at bar), a motion was made before the District Court, essentially to enlarge the time to file an interlocutory appeal. Id. at 159-60. The District Court granted the motion and the Court of Appeals granted leave to appeal.

Despite the lack of compliance with the ten-day provision, the Court asserted jurisdiction, granted review by certiorari, and reversed the judgment of the Court of Appeals on the merits. In a separate opinion, Justice Stevens expressed his disagreement with the Court's summary consideration of the issue, which the Court obviously felt did not even require comment, but agreed with the ultimate conclusion that there was no jurisdictional defect:

> It is quite plain that the District Court in the instant case recertified the interlocutory order nine months after the time for petitioning had expired for the purpose of permitting what would otherwise be a time-barred interlocutory appeal. While I think the jurisdictional question

> here is a close one, and believe that we should not decide it in a summary fashion, I concur in the majority's holding that there is jurisdiction. I am presently persuaded by the view, supported by the commentators, that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will.

Id. at 162.

Consistent with this analysis, the courts of appeals which have considered this issue after Baldwin have held that a district court's recertification of a controlling question of law after expiration of the ten-day period following a prior certification order, does not divest the appellate court of jurisdiction to hear the appeal. According to these authorities, including the Second Circuit's ruling in the case at bar (App. 10a-11a), the relevant inquiry is whether acceptance of the appeal, in light of the district court's recertification, will further or will frustrate the purpose of 28 U.S.C. § 1292(b). See In Re Benny, 812 F.2d 1133, 1137 (9th Cir. 1987) (holding that "if a district court on reconsideration recertifies for interlocutory appeal an order that was previously certified . . . but from which the appellant failed to timely petition to appeal, the court of appeals may exercise jurisdiction . . . if it determines that jurisdiction over the appeal would serve judicial efficiency"). Accord, Nuclear Engineering Co. v. Scott, 660 F.2d 241, 247 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982) (same); see also In re La Providencia Development Corporation, 515 F.2d 94, 95-96 (1st Cir. 1975); Aparicio v. Swan Lake, 643 F.2d 1109, 1113 (5th Cir. 1981)

("The reasons for the earlier certification order continued to exist").

This Court's conclusion in Baldwin, and the weight of authority in the circuits makes sense, in light of the fact that the exercise of jurisdiction by the courts of appeals under § 1292(b), as well as certification or recertification by the district courts, is, in all instances and without exception, discretionary: "Whether to grant any timely section 1292(b) appeal is always a matter within the discretion of a court of appeals." Nuclear Engineering v. Scott, 660 F.2d at 247; see also La Providencia, 515 F.2d at 96 ("The statute explicitly provides, as does F.R.A.P. 5(a) for application to the court of appeals because the appeal from an interlocutory order certified by the district court is not one taken as of right, but one which the court of appeals may hear if it so chooses"); Aparicio, 643 F.2d at 1113 (court of appeals "can prevent any abuse at the district court's discretion merely by denying the prospective appellant permission to appeal the interlocutory order"). Moreover, Fed. R. App. P. 5(a) permits the amendment of the interlocutory order by the district court "'at any time' to supply the certification statement and provides that such an amendment triggers the running [anew] of the ten-day period for applying to [the court of appeals] for permission to appeal." Aparicio v. Swan Lake, 643 F.2d at 1112; see also Note, Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b), 88 Harvard L. Rev. 607, 615-16 (1975).

Plaintiffs' assertion that there is a "conflict" among the circuit courts, which have rendered "inconsistent" decisions on this issue (Petition at 7, 13), is not correct. While the circuits may differ in when and how to exercise their discretion to accept an interlocutory appeal following a recertification by the district court, depending upon the particular circumstances

presented, and considering the various factors involved (as the Court of Appeals did here), it appears that no court which has considered the issue has found an absolute jurisdictional bar to the district court recertifying an issue for interlocutory appeal after expiration of the initial ten-day period.

In Woods v. Baltimore and Ohio Railroad Company, 441 F.2d 407 (6th Cir. 1971) (Petition at 8), the Sixth Circuit concluded that it was without jurisdiction to consider the interlocutory appeal because the District Court there merely vacated its prior order and then refiled it one hour later, without the benefit of any "reconsideration" of the prior order. Id. at 408. The Sixth Circuit expressly did not reach "the question of whether, following expiration of the time period for the filing of an application for permission to appeal, the Court of Appeals could acquire jurisdiction upon the District Court's reconsideration of its prior order and the timely filing of an application after the entry of such order upon reconsideration." Id.[5] Moreover, the Sixth Circuit decided Woods thirteen years before this Court's decision in Baldwin.

In the case at bar, the District Court, in its August 9, 1996 order, recounted the relevant procedural history, and reconsidered and reaffirmed its prior § 1292(b) certification upon defendants' request that the District Court "again to exercise its discretion to certify this matter for appellate

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[5] In Nakhleh v. Chemical Construction Corporation, 366 F.Supp. 1221 (S.D.N.Y. 1973) (Petition at 8), the district court, construing Woods, also concluded that "the mere refiling of an order did not constitute a reconsideration," and recognized that the district court retains jurisdiction of the case, and that prior to final judgment, all interlocutory decisions are subject to reconsideration. Id. at 1223.

consideration" (App. 19a-20a). Moreover, the District Court's recertification order served the additional purpose of incorporating the parties' stipulation, which the Court "so ordered," permitting the State defendants to appeal from the underlying interlocutory order on the merits (App. 30a-31a; see 3 n. 3 supra). Accordingly, the procedure utilized, and result reached, in the case at bar, is not inconsistent with the Sixth Circuit's analysis in Woods, since the District Court's recertification of its prior order was the result of a careful reconsideration of the facts before it and of the continuing need for the interlocutory appeals.

Thus, the purported "conflict" and "continuing split" among the circuits upon which plaintiffs place such heavy reliance (Petition at 7, 19), does not exist. Rather, the decisions reflect nothing more than different courts exercising their discretion in different ways, and considering various factors, in determining when and under what circumstances to grant leave to appeal from an interlocutory order which had been previously certified pursuant to § 1292(b), but for which the ten-day period to apply to the court of appeals for permission to appeal had lapsed.

Even assuming arguendo, that plaintiffs' challenge to the District Court's recertification order raises jurisdictional concerns, they do not bar the instant appeals based on the circumstances here. Even the cases relied upon by plaintiffs (Petition at 15), implicitly recognize that there are exceptions to strict compliance with the ten-day period set forth in 28 U.S.C. § 1292(b). For example, in Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977), the Third Circuit rejected the argument that permitting recertification would circumvent the ten-day rule, and reasoned that permitting recertification can serve the purpose of § 1292(b) in materially

advancing the litigation. Braden, 552 F.2d at 952. In both Braden and Woods, the courts relied upon the fact that the "neglect" of counsel can be a relevant factor in determining jurisdiction, thus acknowledging that failure to comply with the ten-day rule does not deprive the courts of appeals of jurisdiction to hear the appeal in all cases.

Contrary to plaintiffs' argument (Petition at 13-19), recertification of interlocutory orders does not contravene any federal statutes or rules, or this Court's decision in Carlisle v. United States, __ U.S. __, 116 S. Ct. 1460 (1996). Carlisle involved Fed. R. of Crim. P. 29(c) and 45(b), which clearly, plainly and unambiguously prohibit the granting of an untimely postverdict motion for judgment of acquittal. In light of the plain language of those rules, this Court held that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion ... was filed late because of attorney error." Id. at 1464. This Court recognized that federal courts have no power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. Id. at 1466. No such similar circumvention or disregard of plain and unambiguous statutory deadlines is at issue here. To the contrary, there is no statutory time limit for a district court's § 1292(b) certification of an interlocutory order, which can be entered, or reentered, at any time, or amended at any time to include the prescribed language. See Fed. R. App. P. 5(a). By contrast, the ten-day time limit set forth in § 1292(b) is similar to the seven-day time limit of Fed. R. Crim. P. 29(c) and 45(b), in that neither can be alleviated or changed by the courts. See Fed. R. App. P. 26(b). However, unlike the petitioner in Carlisle, defendants in the case at bar timely made their motion to the Court of Appeals within the applicable statutory deadline.

Since the order appealed from is interlocutory, the District Court continues to exercise plenary control over the underlying litigation, and a hard and fast rule that the District Court cannot recertify a controlling question of law makes no procedural sense. A question of law is controlling when the District Court concludes that "there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The resolution of such a question does not lose its immediacy in the event that the ten-day period is inadvertently allowed to run. This is not to say that delay, neglect of counsel, or other such factors are irrelevant to the inquiry. However, as the Fifth Circuit opined:

> A contrary interpretation of the statute would preclude an interlocutory appeal under circumstances in which the criteria of the statute are satisfied and both the district court and this court have concluded that an interlocutory appeal is appropriate . . . [W]e can prevent any abuse of the district court's discretion merely by denying the prospective appellant permission to appeal the interlocutory order.

Aparicio v. Swan Lake, 643 F.2d at 1112-13.

Thus, the issue here is not jurisdictional, but whether the District Court abused its discretion by recertifying the controlling question of law for immediate appeal. On the facts presented, it did not. Moreover, as the Court of Appeals recognized, not only did plaintiffs not object in the District Court to the recertification, they in fact consented to the recertification and made certain requests that the Court impose

conditions, to which the Court and defendants agreed (App. 27a-28a). The District Court's order was thus limited to allow only three business days after recertification for the defendants to file their motions in the Court of Appeals. Furthermore, the defendants' motion to the District Court to recertify the controlling question was brought only three days after the original ten-day deadline lapsed, and was necessitated by a mere ministerial error in calculating the original time period. For these reasons, plaintiffs cannot have sustained any prejudice from the procedure followed by the District Court, nor have they alleged any. See Nuclear Engineering, 660 F.2d at 247; Braden v. University of Pittsburgh, 552 F.2d at 954-55 (prejudice to the appellee is a factor to be considered by the courts in exercising discretion to re-enter certification order). The total lack of prejudice to plaintiffs is underscored by their tardiness in raising this jurisdictional challenge, as the Court of Appeals aptly observed (App. 11a). In fact, plaintiffs waited to do so until after defendants had filed their briefs on the merits of the class certification issue, and one week before their opposing brief was due to be filed.[6]

Acceptance of the appeal by the Court of Appeals, moreover, was entirely proper and consistent with the intent of 28 U.S.C. § 1292(b). Since defendants' failure to file their motions for leave to appeal within the initial ten-day period

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[6] Plaintiffs argue that defendants' "[f]ailure to comply with the jurisdictional requirements for interlocutory appellate review would be without prejudice to [their] right to raise the same issue after final judgment" (Petition at 2 n.1). This argument not only runs counter to the purpose of interlocutory review, but plaintiffs fail to acknowledge that they, too, are not precluded from raising the arguments they advance in support of this petition at a future date, in the event that they do not prevail on the interlocutory appeal.

was clearly inadvertent, there was no intent to circumvent the applicable time frames. In addition, there was no delay in the defendants' prosecution of their appeals as a result of the recertification. Also, as the District Court and the Court of Appeals emphasized, the acceptance of these interlocutory appeals furthers these interests promoted by 28 U.S.C. § 1292(b) (App. 10a-12a, 20a). The question of class certification is still an issue which will determine the future course of this litigation, and which still needs to be definitively settled before the trial, which is scheduled for mid-November, 1997. That there is substantial merit to the appeal is also demonstrated, if nothing else, by the fact that both the Court of Appeals and the District Court agreed that the certified question should be resolved immediately.

In sum, there was no statutory or legal prohibition precluding the District Court from recertifying pursuant to § 1292(b) the interlocutory order at issue here. Nor was there any jurisdictional bar to the Court of Appeals accepting this appeal upon timely application following such certification. Whether or not to grant § 1292(b) certification or leave to appeal are matters within the sound discretion of the district courts and the courts of appeals, respectively. The different conclusions reached by the circuits that have considered this issue depend upon a consideration and balancing of the various factors and particular circumstances of each case, and do not create a split of authority or a conflict among the circuits, or warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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